NO. 80-332

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

JAMES A. RHODES et al.,
Petitioners,

vs.

KELLY CHAPMAN et al.,
Respondents

On Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

I. Standards of Civilized Decency

Respondents, in their brief at page 6, footnote 3, assert that because the question in this case is phrased in terms of the constitutionality of double-celling, this Court may want to consider whether its grant of certiorari was improvident. Such a suggestion is without merit because the district court precisely made double-celling the focus of its decision:

> It is our conclusion overly and on balance that the double celling at Lucasville is unconstitutional. (P.A.34)

The district court failed to distinguish double-celling from overcrowding. A single celled institution may be overcrowded and, conversely, a double-celled facility may not be. The district court equated what it found to be the design capacity of the institution with the ~~minimum~~ maximum constitutionally permitted population.

Respondents suggest that this case did not involve the issue of double-celling as an isolated practice, but only as an incident of the larger issue of overcrowding. While thus denying that the district court found double-celling to be *per se* unconstitutional, the respondents argue that the practice violates "standards of civilized decency". Considering that few prisons can meet the space requirements demanded by respondents, *per se* is an apt description of the district court's holding.

Single celling may be a desirable goal; however, what is desirable and preferable is not constitutionally mandated under the Eighth Amendment. The ban on cruel and unusual punishment is certainly not a proscription of all but the optimum conditions. As stated by Justice Blackman in his dissent in *United States v. Bailey*, 444 U.S. 594, 424 (1980):

> This however does not excuse the failure to provide a place of confinement that meets *minimal* standards of safety and decency (emphasis added).

This is the position the petitioners have maintained throughout and is consistent with the opinion in *Newman v. Alabama*, 559 F. 2d 283 (5th Cir. 1977); *cert. den.* 438 U.S. 915 (1978). See also *Bell v. Wolfish*, 441 U.S. 520, 529 n. 11 (1979).

A comparison of the conditions at S.O.C.F. and the conditions and practices in federal institutions, as evidenced by the memorandum of the United States filed herein, demonstrates that the standards of a civilized society cannot be analytically created in an utopian vacuum. (See also Carlson Deposition pp. 8-13, 26; Levinson Deposition pp. 12, 16, 21, 29, 37). Currently, twenty-nine (29) federal prisons are over design capacity; a substantial number of federal prisoners are provided with less space per man than inmates at S.O.C.F.; and some are multiple-celled on a twenty-three hour per day basis. Multiple- celled inmates in the federal system are also serving long sentences and the practice apparently has continued for some time.

The practice of double and multiple celling by the federal government demonstrates that the use of multiple occupancy living quarters is not uncommon in prisons, nor is it uncommon in other types of institutions and the home. So common a practice can hardly be violative of the standards of civilized decency.

II. Violence, Physical Injury, and Psychological Injury

Throughout their brief, respondents argue that conditions found at S.O.C.F. led to violence, riot, physical injury, and psychological damage. This argument is supported in large part by reference to a number of books and

articles written prior to the trial of this case by persons respondents choose not to call as witnesses. Moreover, no witness called by either party made reference to any of the works cited by the respondents. Respondents desperate reliance on such secondary sources is dictated by the fact that the record of the case simply does not support their claim that the conditions at S.O.C.F. resulted in violence, riot, or physical or psychological injury.

Two inmates, called by respondents, in fact testified their behavior had improved after S.O.C.F. was double celled (R 219-220, 414-415); another respondent inmate testified that he requested a double cell for protection (R 188); and two inmates testified on respondents' behalf they had refused transfers out of S.O.C.F. (R 216, 222, 323). Corrections experts testifying on behalf of the respondents found the institution quiet (R 92) and the population docile (R 1111). Three psychologists testified that they knew of no relationship between double celling and increased violence (R 895-897, 988, 1001-1002; Levinson Deposition pp. 12, 29). The institution's physician had noticed only a small increase in stress related complaints. (R 940).

No increase in the rate of violence was found by the district court. No riot has ever occurred at S.O.C.F.

Respondents attempt to support their argument by relying heavily on the testimony of Dr. Louis Lindner, whom they characterize as an "expert psychiatrist". However, at trial, respondents were careful to qualify Dr. Lindner only as a physician (R 424). Dr. Lindner later claimed to be a psychiatrist but stated that he was neither board certified nor eligible for certification in that specialty (R 436-437). The record is also clear that Dr. Lindner's testimony amounted to little more than a series of guesses. He had never visited S.O.C.F. nor examined an inmate (R 436, 444). He had not studied the effects of crowding

nor had he done any personal research on the subject (R 429). He stated his opinion was based only on what he had read (R 429) but then stated he had not read any books on the effects of crowding (R 443). Even if Dr. Lindner's qualifications were accepted by the district court, his testimony does not support respondents' position. When asked if crowding contributed to a riot at another institution with which he was familiar, his reply was that the connection ". . . would involve a very speculative chain." (R 444). It should also be noted that the district court found no causal connection between the conditions present at S.O.C.F. and the mental status of the inmates.

No objective evidence was offered at trial to show that double-celling had any psychological effect on the population. No finding was made that any inmate had suffered an emotional or mental disorder as a result of double-celling or the increase in population.

Respondents place particular emphasis on the factor of time out of cell. Respondents claim that inmates are allowed out of their cells for only ten (10) hours each day. The district court found however that 75% of the inmates could be out of their cells from 6:30 a.m. to 9:30 p.m. (PA15). Generally, inmates are permitted out of their cells from 6:30 a.m. to 9:30 p.m. (R 159, 836). The figure of 10 hours set out in the proposed findings of fact and conclusions of law was nothing more nor less than an average; i.e. while an inmate is free to leave his cell for fifteen (15) hours each day some do not always take advantage of the opportunity.

Inmates in the most secure classifications were permitted out of their cells on a limited basis for exercise. Inmates classified to administrative isolation (J-1, J-4 and K-4) were single celled and allowed out two (2) hours per week and for visits. Inmates classified as voluntarily idle (J-4, K-4 and K-3) were double-celled and allowed out for four (4) hours per week and visits. Those classified as

protective custody inmates (K-1) were single celled and allowed out for three (3) hours per week and for visits. Inmates in the limited activity classification, a voluntary status, (K-2) were double-celled and permitted out of their cells for six (6) hours each week and for visits. Death row inmates (J-3) were single-celled and permitted out of their cells for two (2) hours per week and for visits. Inmates in disciplinary isolation, a temporary classification, (J-2) were permitted out of their cells for one (1) hour each week and for visits. Newly received inmates (K-5) were double-celled and permitted out of their cells for four (4) hours exercise each week, visits, meals and orientation. Inmates in the general population (K-6 to K-8 and L-1 to L-8) were permitted out of their cells from 6:30 a.m. to 9:30 p.m. to work, attend classes, visit the library, exercise in the gyms, eat, shower, use the day rooms and other chosen and required activities (P.A. 16-18). A similar dichotomy between general population and special classification exists in most prison systems. See the memorandum of the United States, pp. 4, 10.

In their brief filed herein, respondents submit in support of their argument that other courts have found double celling to have been unconstitutional under the "totality of circumstances" doctrine. An examination of these cases discloses that in each it was found that conditions were horrible, depriving the inmates of most, if not all, of their constitutionally protected entitlements and were such as to shock the conscience of the court and in fact were cruel and barbarous. Appellees cite a recently decided case, *Ramos v. Lamb*, No. 79-2324 (10th Cir. 9-25-79). That case reviewed *Ramos v. Lamb*, 485 F. Supp. 122 (D. Col. 1979). The prison involved in *Ramos* was antiquated, built for the most part in the early part of this century. The district court in its findings of fact set forth:

> As will be stated more explicitly, the evidence in this case shows that prisoners in the Canon Correctional Facility are housed under conditions which fall below all recognized constitutional and professional standards. Those conditions include insufficient living space with inadequate sanitation, ventilation, light, heat, noise control and fire safety; lack of protection from violence; massive and pervasive idleness because of lack of productive activity; inadequate medical care (both mental and physical); and unnecessarily restrictive classification of prisoners into security classifications which exacerbate physical and mental deterioration. 485 F. Supp. at 133.

The district court herein made no such finding.

In *Ramos* the district court mandated among other things that pending a stay, each inmate must be involved in some sort of productive activity at least eight hours a day and that no inmate might be housed in less than 80 square feet for 20 or more hours a day. 485 F. Supp. at 170.

In its review of the district court decision and order, in a carefully considered opinion consisting of 76 pages, the court of appeals thoroughly considered each of the district court's findings of constitutional deprivations and at page 15 of its opinion stated:

> We conclude that in the areas of shelter, sanitation, food, personal safety, and medical care — *the core areas in any Eighth Amendment claim* — the district court's findings and conclusions of

> violations of the plaintiffs' rights are entirely justified and supported by the record. We do not think, however, that the record in this case requires or justifies going into all of the concepts on penology pressed by the plaintiffs and adopted in the district court's opinion — *the concept of motility, classifications, and idleness — since the shortcomings in these areas are not of constitutional dimension* (emphasis added).

The Court of Appeals then vacated that part of the district court's order dealing with motility, classification and idleness.

These areas upon which the court of appeals in *Ramos* reversed the district court, motility and idleness, were the primary bases for findings below that double celling at S.O.C.F. was unconstitutional. The court of appeals herein sustained the district court in a less than two page order.

The respondents have also contended that the district court's order is reasonable in light of the lengthy sentences being served at S.O.C.F. While it is true that many prisoners are serving long sentences, those sentences, except in a very few cases, are seldom entirely served in one institution. Prisoners at S.O.C.F. are reclassified on a regular basis to other institutions.

III. Penological Purpose

Respondents assert that double celling serves no penological purpose. Invariably however that mistakes the question and harkens back to the compelling necessity test rejected in *Bell v. Wolfish*, 441 U.S. 520 (1979). The question is not whether double celling serves a penological purpose with respect to the individual inmate's

rehabilitation, but whether the practice causes "genuine deprivation and hardship". *Bell, supra* at 543. Moreover respondents use the term "penological purpose" in a self limiting sense by focusing only on the individual inmate. The self-evident basic function of a prison is to separate convicted felons from the general population. Unless the institution of prison is forbidden, a practice which increases the ability and capacity of society to perform this function also serves a penological purpose. Double-celling at S.O.C.F. allowed the classification of maximum security prisoners to a maximum security institution thereby insuring the safety of the general public and the safety of the inmates of Ohio's medium and minimum security institutions.

The decision of the district court limiting the population of S.O.C.F. to a specific number, not only obstructed the classification process, but caused the reopening of closed sections of the Ohio Penitentiary, the institution S.O.C.F. was designed to replace. Respondents' allegation that the district court's order was easily complied with is simply not true.

IV. *Bell v. Wolfish*

By attempting to factually distinguish M.C.C., the institution involved in *Bell v. Wolfish*, and S.O.C.F., respondents illustrate the failure of the courts below to grasp the essence of the holding in that case. Petitioners will not attempt to deny that factual variations obviously exist, though disputing some overstatements and misstatements of the differences. Rather the central point of *Bell* was that there is no one man — one cell principle lurking in the Fifth Amendment nor is such a principle embodied in the Eighth Amendment. For double-celling to be part of the calculus in the "totality of the circumstances" something more than the practice must be shown.

Genuine privation and hardship, factors not evident on the record of this case, must be proved. The term "totality of the circumstances" states a conclusion not an analysis of the factors which show "privation and hardship". While perhaps useful as a "catchword" to justify the result in a prison correctly pictured as "a dark and evil world completely alien to the free world", *Hutto v. Finney*, 437 U.S. 678,681 (1978), the magic invocation of the term does nothing to further the analysis. The question presented to this court is clear. Can a modern institution like S.O.C.F. utilize double-celling to alleviate the pressures of increased prison commitments where prisoners are not thereby denied the minimum constitutional guarantees to adequate food, clothing, shelter, sanitation, medical care and general safety? As the district court made an *ad hoc* determination on the practice of double celling itself, reversal is dictated.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Reply Brief have been served on respondents, Kelly Chapman, #122-531, P.O. Box 45699, Lucasville, Ohio 45699 and Richard Jaworski, #734304, River Junction Correctional Institution, P.O. Box 37, Chattahoochee, Florida, 32324 by forwarding such copies through the office of their counsel, Louis A. Jacobs, Ohio State University, College of Law, 1659 North High Street, Columbus, Ohio, 43210, Jean P. Kamp, Legal Aid Society of Columbus, 40 West Gay Street, Columbus, Ohio, 43215, Christopher D. Stanley, 611 Rockefeller Building, Cleveland, Ohio, 44113, Bruce A. Campbell and Elinor Alger, American Civil Liberties Union of Ohio Foundation, Inc., 360 South Third Street, Columbus, Ohio, 43215, and Robert K. Handelman, 186 East Eleventh Avenue, Columbus, Ohio, 43201, by United States mail, postage prepaid, this day of February, 1981. I further certify that all parties required to be served have been so served.

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Assistant Attorney General